

purchase such a book at more than the cost of reproduction and distribution. In other words, such information is “publicly available” even though the author makes a profit on your particular purchase for the inherent value of the information.

Section I: Miscellaneous

Question I(1): The manufacturing plant that I work at is planning to begin admitting groups of the general public to tour the plant facilities. We are concerned that a license might be required if the tour groups include foreign nationals. Would such a tour constitute an export? If so, is the export subject to the EAR?

Answer: The EAR define exports and reexports of technology to include release through visual inspection by foreign nationals of U.S.-origin equipment and facilities. Such an export or reexport qualifies under the “publicly available” provision and would not be subject to the EAR so long as the tour is truly open to all members of the public, including your competitors, and you do not charge a fee that is not reasonably related to the cost of conducting the tours. Otherwise, you will have to obtain a license, or qualify for a License Exception, prior to permitting foreign nationals to tour your facilities (§ 734.7 of this part).

Question I(2): Is the export or reexport of information subject to the EAR if the information is not in a library or published, but sold at a price that does not exceed the cost of reproduction and distribution?

Answer: Information that is not in a library accessible to the public and that has not been published in any way, may nonetheless become “publicly available” if you make it both available to a community of persons and if you sell it at no more than the cost of reproduction and distribution. Such reproduction and distribution costs may include variable and fixed cost allocations of overhead and normal profit for the reproduction and distribution functions either in your company or in a third party distribution system. In your company, such costs may not include recovery for development, design, or acquisition costs of the technology or software. The reason for this conclusion is that the provider of the information receives nothing for the inherent value of the information.

Question I(3): Is the export or reexport of information contributed to an electronic bulletin board subject to the EAR?

Answer: Assume each of the following:

1. Information is uploaded to an electronic bulletin board by a person that is the owner or originator of the information;
2. That person does not charge a fee to the bulletin board administrator or the subscribers of the bulletin board; and
3. The bulletin board is available for subscription by any subscriber in a given com-

munity regardless of the cost of subscription.

Such information is “publicly available” and therefore not subject to the EAR even if it is not elsewhere published and is not in a library. The reason for this conclusion is that the bulletin board subscription charges or line charges are for distribution exclusively, and the provider of the information receives nothing for the inherent value of the information.

Question I(4): Is the export or reexport of patented information fully disclosed on the public record subject to the EAR?

Answer: Information to the extent it is disclosed on the patent record open to the public is not subject to the EAR even though you may use such information only after paying a fee in excess of the costs of reproduction and distribution. In this case the seller does receive a fee for the inherent value of the technical data; however, the export or reexport of the information is nonetheless not subject to the EAR because any person can obtain the technology from the public record and further disclose or publish the information. For that reason, it is impossible to impose export controls that deny access to the information.

[61 FR 12746, Mar. 25, 1996, as amended at 61 FR 68579, Dec. 30, 1996; 62 FR 25456, May 9, 1997; 73 FR 35, Jan. 2, 2008; 73 FR 57503, Oct. 3, 2008]

SUPPLEMENT NO. 2 TO PART 734—
GUIDELINES FOR *De Minimis* RULES

(a) Calculation of the value of controlled U.S.-origin content in foreign-made items is to be performed for the purposes of § 734.4 of this part, to determine whether the percentage of U.S.-origin content is *de minimis*. (Note that you do not need to make these calculations if the foreign made item does not require a license to the destination in question.) Use the following guidelines to perform such calculations:

(1) *U.S.-origin controlled content.* To identify U.S.-origin controlled content for purposes of the *de minimis* rules, you must determine the Export Control Classification Number (ECCN) of each U.S.-origin item incorporated into a foreign-made product. Then, you must identify which, if any, of those U.S.-origin items would require a license from BIS if they were to be exported or reexported (in the form in which you received them) to the foreign-made product’s country of destination. For purposes of identifying U.S.-origin controlled content, you should consult the Commerce Country Chart in Supplement No. 1 to part 738 of the EAR and controls described in part 746 of the EAR. Part 744 of the EAR should not be used to identify controlled U.S. content for purposes of determining the applicability of the *de minimis*

rules. In identifying U.S.-origin controlled content, do not take account of commodities, software, or technology that could be exported or reexported to the country of destination without a license (designated as “NLR”) or under License Exception GBS (see part 740 of the EAR). Commodities subject only to short supply controls are not included in calculating U.S. content.

NOTE TO PARAGRAPH (A)(1): U.S.-origin controlled content is considered ‘incorporated’ for *de minimis* purposes if the U.S.-origin controlled item is: Essential to the functioning of the foreign equipment; customarily included in sales of the foreign equipment; and reexported with the foreign produced item. U.S.-origin software may be ‘bundled’ with foreign produced commodities; see §734.4 of this part. For purposes of determining *de minimis* levels, technology and source code used to design or produce foreign-made commodities or software are not considered to be incorporated into such foreign-made commodities or software.

(2) *Value of U.S.-origin controlled content.* The value of the U.S.-origin controlled content shall reflect the fair market price of such content in the market where the foreign product is being produced. In most cases, this value will be the same as the actual cost to the foreign manufacturer of the U.S.-origin commodity, technology, or software. When the foreign manufacturer and the U.S. supplier are affiliated and have special arrangements that result in below-market pricing, the value of the U.S.-origin controlled content should reflect fair market prices that would normally be charged to unaffiliated customers in the same foreign market. If fair market value cannot be determined based upon actual arms-length transaction data for the U.S.-origin controlled content in question, then you must determine another reliable valuation method to calculate or derive the fair market value. Such methods may include the use of comparable market prices or costs of production and distribution. The EAR do not require calculations based upon any one accounting system or U.S. accounting standards. However, the method you use must be consistent with your business practice.

(3) *Foreign-made product value—(i) General.* The value of the foreign-made product shall reflect the fair market price of such product in the market where the foreign product is sold. In most cases, this value will be the same as the actual cost to a buyer of the foreign-made product. When the foreign manufacturer and the buyer of their product are affiliated and have special arrangements that result in below-market pricing, the value of the foreign-made product should reflect fair market prices that would normally be charged to unaffiliated customers in the same foreign market. If fair market value

cannot be determined based upon actual arms-length transaction data for the foreign-made product in question, then you must determine another reliable valuation method to calculate or derive the fair market value. Such methods may include the use of comparable market prices or costs of production and distribution. The EAR do not require calculations based upon any one accounting system or U.S. accounting standards. However, the method you use must be consistent with your business practice.

(ii) *Foreign-Made Software.* In calculating the value of foreign-made software for purposes of the *de minimis* rules, you may make an estimate of future sales of that foreign software. The total value of foreign-made software will be the sum of: The value of actual sales of that software based on orders received at the time the foreign software incorporates U.S.-origin content and, if applicable; and an estimate of all future sales of that software.

NOTE TO PARAGRAPH (A)(3): Regardless of the accounting systems, standard, or conventions you use in the operation of your business, you may not depreciate reported fair market values or otherwise reduce fair market values through related accounting conventions. Values may be historic or projected. However, you may rely on projected values only to the extent that they remain consistent with your documentation.

(4) *Calculating percentage value of U.S.-origin items.* To determine the percentage value of U.S.-origin controlled content incorporated in, commingled with, or “bundled” with the foreign produced item, divide the total value of the U.S.-origin controlled content by the foreign-made item value, then multiply the resulting number times 100. If the percentage value of incorporated U.S.-origin items is equal to or less than the *de minimis* level described in §734.4 of the EAR, then the foreign-made item is not subject to the EAR.

(b) *One-time report.* As stated in paragraphs (c) and (d) of §734.4, a one-time report is required before reliance on the *de minimis* rules for technology. The purpose of the report is solely to permit the U.S. Government to evaluate whether U.S. content calculations were performed correctly.

(1) *Contents of report.* You must include in your report a description of the scope and nature of the foreign technology that is the subject of the report and a description of its fair market value, along with the rationale and basis for the valuation of such foreign technology. Your report must indicate the country of destination for the foreign technology reexports when the U.S.-origin controlled content exceeds 10%, so that BIS can evaluate whether the U.S.-origin controlled content was correctly identified based on paragraph (a)(1) of this Supplement. The report does not require information regarding

the end-use or end-users of the reexported foreign technology. You must include in your report the name, title, address, telephone number, E-mail address, and facsimile number of the person BIS may contact concerning your report.

(2) *Submission of report.* You must submit your report to BIS using one of the following methods:

- (i) E-mail: rp2@bis.doc.gov;
- (ii) Fax: (202) 482-3355; or
- (iii) Mail or Hand Delivery/Courier: Regulatory Policy Division, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th and Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230.

(3) *Report and wait.* If you have not been contacted by BIS concerning your report within thirty days after filing the report with BIS, you may rely upon the calculations described in the report unless and until BIS contacts you and instructs you otherwise. BIS may contact you with questions concerning your report or to indicate that BIS does not accept the assumptions or rationale for your calculations. If you receive such a contact or communication from BIS within thirty days after filing the report with BIS, you may not rely upon the calculations described in the report, and may not use the *de minimis* rules for technology that are described in § 734.4 of this part, until BIS has indicated that such calculations were performed correctly.

[73 FR 56969, Oct. 1, 2008]

PART 736—GENERAL PROHIBITIONS

Sec.

736.1 Introduction.

736.2 General prohibitions and determination of applicability.

SUPPLEMENT NO. 1 TO PART 736—GENERAL ORDERS

SUPPLEMENT NO. 2 TO PART 736—ADMINISTRATIVE ORDERS

AUTHORITY: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 2151 note; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, May 13, 2004; Notice of August 13, 2009, 74 FR 41325 (August 14, 2009); Notice of November 6, 2009, 74 FR 58187 (November 10, 2009).

SOURCE: 61 FR 12754, Mar. 25, 1996, unless otherwise noted.

§ 736.1 Introduction.

In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C. A person may undertake

transactions subject to the EAR without a license or other authorization, unless the regulations affirmatively state such a requirement. As such, if an export, reexport, or activity is subject to the EAR, the general prohibitions contained in this part and the License Exceptions specified in part 740 of the EAR must be reviewed to determine if a license is necessary. In the case of all exports from the United States, you must document your export as described in part 762 of the EAR regarding recordkeeping and clear your export through the U.S. Customs Service as described in part 758 of the EAR regarding export clearance requirements. Also note that for short supply controls all prohibitions and License Exceptions are in part 754 of the EAR.

(a) In this part we tell you:

(1) The facts that make your proposed export, reexport, or conduct subject to these general prohibitions, and

(2) The ten general prohibitions.

(b) Your obligations under the ten general prohibitions and under the EAR depend in large part upon the five types of information described in § 736.2(a) of this part and upon the general prohibitions described in § 736.2(b) of this part. The ten general prohibitions contain cross-references to other parts of the EAR that further define the breadth of the general prohibitions. For that reason, this part is not free-standing. In part 732, we provide certain steps you may follow in proper order to help you understand the general prohibitions and their relationship to other parts of the EAR.

(c) If you violate any of these ten general prohibitions, or engage in other conduct contrary to the Export Administration Act, the EAR, or any order, license, License Exception, or authorization issued thereunder, as described in part 764 of the EAR regarding enforcement, you will be subject to the sanctions described in that part.

§ 736.2 General prohibitions and determination of applicability.

(a) *Information or facts that determine the applicability of the general prohibitions.* The following five types of facts determine your obligations under the ten general prohibitions and the EAR generally: